FILED

01 1713 MAY 21 2002

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

REPUBLICAN CAUCUS OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES,
Appellant

v.

RICHARD VIETH, *et.al.*
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

APPENDIX TO JURISDICTIONAL STATEMENT

JOHN P. KRILL, JR.
(Counsel of Record)
LINDA J. SHOREY
JULIA M. GLENCER
KIRKPATRICK & LOCKHART LLP
240 NORTH THIRD STREET
HARRISBURG, PENNSYLVANIA 17101
(717) 231-4500
(717) 231-4501 (fax)
COUNSEL FOR APPELLANT

MAY 21, 2002

52 pg

TABLE OF CONTENTS

Page

Order, Denying Motion for Protective Order (February 22, 2002) 1a

Notice of Appeal to the United States Court of Appeals for the Third Circuit 2a

Letter from Clerk of the United States Court of Appeals for the Third Circuit re: Dismissal for Possible Jurisdictional Defect 4a

Letter Brief of House Republican Caucus in Support of Jurisdiction in the United States Court of Appeals for the Third Circuit 7a

Notice of Appeal to the Supreme Court of the United States 16a

Subpoena Duces Tecum to the Custodian of Records of the Carnegie Mellon University 17a

Expedited Motion to Quash Subpoena or for Protective Order 20a

Memorandum of Law in Support of Motion to Quash Subpoena or for Protective Order 22a

Motion to Intervene of House Republican Caucus 37a

Memorandum of Law in Support of Motion to Intervene of House Republican Caucus 40a

Order, Granting Motion to Intervene
(February 22, 2002) 44a

Motion to Stay Order Denying Motion to Quash
or for Protective Order 46a

Order, Denying Motion to Stay Order
(February 26, 2002) 49a

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	:	CIVIL NO. 1:CV-01-2439
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	
Defendants	:	

ORDER

IT IS HEREBY ORDERED THAT Defendants' motion to quash the subpoena *duces tecum* served upon the Custodian of Records of Carnegie Mellon University is **DENIED**.

SYLVIA H. RAMBO
United States District Judge

February 22, 2002.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	:	CIVIL NO. 1:CV-01-2439
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	
Defendants	:	

NOTICE OF APPEAL

The Republican Caucus of the Pennsylvania House of Representatives, which was granted intervention in this matter, appeals to the United States Court of Appeals for the Third Circuit from the order denying the Motion to Quash Subpoena or For Protective Order entered on February 22, 2002.

February 25, 2002

Respectfully submitted,

/S/ Linda J. Shorey
Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
Jason E. Oyler
Pa. ID No. 84473
John P. Krill, Jr.
Pa. ID No. 16287
Kirkpatrick & Lockhart llp
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
Counsel for House Republican Caucus

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790
Website: http://www.ca3.uscourts.gov
Office of the Clerk
Marcia M. Waldron
215-597-2995

February 28, 2002

Linda Shorey, Esq.
Julia M. Glencer, Esq.
Jason E. Oyler, Esq.
John P. Krill, Jr., Esq.
Kirkpatrick & Lockhart
240 North Third Street
Payne-Shoemaker Building
Harrisburg, PA 27202

Robert B. Hoffman, Esq.
Reed Smith
213 Market Street, 9th Flocr
Harrisburg, PA 17101

Paul M. Smith, Esq
Thomas J. Perrelli, Esq.
Bruce V. Spiva, Esq.
Daniel P. Mach, Esq.
Brian P. Hauck, Esq.
Jenner & Block
601 13th Street, N.W., 12th Floor
Washington, DC 20005

J. Bart DeLone, Esq.
Office of Attorney General of Pennsylvania
Strawberry Square, 15th Floor
Harrisburg, PA 17120

RE: Vieth, et al. v. Commonwealth of Pennsylvania, et al., C.A. No. 02-1580
MD PA No. 1:CV-01-2439

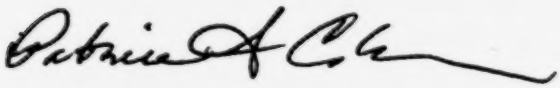
Dear Counsel:

Please be advised that the above captioned appeal will be submitted for possible dismissal due to a jurisdictional defect. It appears that the Court of Appeals lacks jurisdiction over the matter under 28 U.S.C. Section 1253 which provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.

Responses to the possible dismissal of this case for lack of jurisdiction may be submitted by any party. The responses are to be filed within 14 days from the date of this order. All responses must be in proper form, i.e., an original and three (3) copies with a certificate of service.

Very Truly Yours,
MARCIA M. WALDRON, Clerk



By: Patricia S. Coleman,
Legal Coordinator

Cc: Chris Vasil, Supreme Court of the United States
Mary D'Andrea, Clerk U.S. District Court for the Middle District of Pennsylvania

APPENDIX D

March 13, 2002

Linda J. Shorey
717.231.4510
Fax: 717.231.4501
lshorey@kl.com

Marcia M. Waldron,
Office of the Clerk
United States Court of Appeals for
the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

RE: Vieth, et al. v. Commonwealth of Pennsylvania, et al., C.A. No. 02-1580

Dear Ms. Waldron:

By letter dated February 28, 2002, counsel in the above-referenced appeal were asked to address the Court's concern that jurisdiction over the present appeal lies in the United States Supreme Court, and not in this Court. Specifically, the letter stated:

> Please be advised that the above-captioned appeal will be submitted for possible dismissal due to a jurisdictional defect. It appears that the Court of Appeals lacks jurisdiction over the matter under 28 U.S.C. Section 1253.

This letter brief, urging the Court not to dismiss for lack of jurisdiction under Section 1253, is submitted on behalf of Appellant (Intervenor below), the House Republican

Caucus of the Pennsylvania General Assembly ("House Republican Caucus").[1]

BACKGROUND

Plaintiffs in the underlying action challenge Act 1, legislation putting into place 19 congressional districts in the Commonwealth of Pennsylvania pursuant to the 2000 Census. Named as defendants were the Commonwealth of Pennsylvania, Governor Schweiker, Secretary Kim Pizzingrilli & Commissioner Richard Filling ("Executive Officers"), and Lieutenant Governor Robert C. Jubelirer & Speaker of the Pennsylvania House of Representatives Matthew Ryan ("Presiding Officers").

A three-judge court (Nygaard, C.J., Rambo, and Yohn, D.J.) was convened in this matter pursuant to 28 U.S.C. §2284(a), which provides, in pertinent part,

> (a) A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts . . .

On January 29, 2002, the three-judge court established a hearing date of March 11-12, 2002, and issued a discovery schedule.

On February 8, 2002, Plaintiffs served a subpoena *duces tecum* ("subpoena") on the Custodian of Records of

---

[1] While the House Republican Caucus believes that this Court has jurisdiction over the present appeal, it will file a protective appeal with the United States Supreme Court if the jurisdictional issue is not resolved before expiration of the appeal period on March 24, 2002.

the Carnegie Mellon University, seeking production of the following documents:

> (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; an[d] (2) all communications, including request for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

On February 19, 2002, Presiding Officers filed a motion to quash the subpoena, or alternatively, for a protective order. In their supporting memorandum of law, Presiding Officers argued that the subpoena should be quashed for failure to serve a notice of deposition on Presiding Officers' counsel and/or a protective order should issue to prohibit the discovery as violative of the common law legislative privilege. The House Republican Caucus (the present Appellant) filed a motion to intervene for the limited purpose of supporting Presiding Officers' motion.

On February 22, 2002, the three-judge court (Rambo, J.) granted the motion to intervene. By separate order, the three-judge court (Rambo, J.) denied the motion to quash the subpoena or for protective order. Presiding Officers and the House Republican Caucus jointly filed an immediate motion seeking to stay the latter order. On

February 25, 2002, the House Republican Caucus filed a timely notice of appeal to this Court.[2]

ARGUMENT

A. Interpreting Section 1253

Prior to 1976, three-judge courts were required in a myriad of different types of actions. *See Page v. Bartels*, 248 F.3d 175, 188-189 (3d Cir. 2001) (tracing evolution of three-judge courts).[3] Presently, three-judge courts are convened when required by an Act of Congress or where, such as here, a reapportionment statute is challenged on constitutional grounds. *See* U.S.C. §2284(a); *see also Page*.

Section 1253 governs appeals from orders entered by three-judge courts. That provision provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from

---

[2] On February 25, 2002, the recipient of the subpoena produced most of the documents requested. On February 26, 2002, Presiding Officers and the House Republican Caucus jointly filed a letter seeking to withdraw their request for a stay. The three-judge court (Rambo, J.) denied the motion for a stay as moot on February 26, 2002. The House Republican Caucus is pursuing this appeal as the issue is one that is capable of recurring and again evading review.

[3] In 1976, 28 U.S.C. §§ 2281 & 2282 (sections of the Three-Judge Court Act) were repealed, largely to do away with the cumbersome mechanism of the three-judge court. Only Section 2284 remains in Title 28, in recognition of the belief that the benefit of the three-judge court in reapportionment cases outweighs its cumbersome nature. 22 MOORE'S FEDERAL PRACTICE §404.03[1] (3d ed. 2001).

> an order granting or denying, after notice and a hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. §1253 (emphasis added). Section 1253 is narrowly construed in light of the strong policy of minimizing the mandatory docket of the Supreme Court. *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975).[4] Under the plain language of Section 1253, the Supreme Court has direct jurisdiction to review only those orders of a three-judge court "granting or denying ... an interlocutory or permanent injunction."

The Supreme Court interprets Section 1253 consistent with the provision's plain language. In *Goldstein v. Cox*, 396 U.S. 471, 478 (1970), the Court noted that its "jurisdiction over interlocutory orders under §1253 is confined to orders granting or denying a preliminary injunction." In *MTM*, the Court stated that "a direct appeal will lie to th[e] [Supreme] Court under §1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief *only* where such order rests upon resolution of the merits of the constitutional claim." 420 U.S. at 804 (emphasis added). *See also* Robert L. Stern, et al., SUPREME COURT PRACTICE § 2.9 (7th ed. 1993) ("By referring without qualification to actions 'challenging

---

[4] Much of the precedent interpreting and applying Section 1253 was issued before the 1976 reduction in three-judge courts. Because the language of Section 1253 was not altered by the repeal of numerous of the three-judge court statutes, these cases provide guidance in appeals in reapportionment cases. *See* MOORE'S FEDERAL PRACTICE §404.21[2][a].

the constitutionality' of apportionment, §2284(a) does not limit the use of three-judge courts to injunction actions ... [b]ut the only basis for directly appealing a reapportionment case to the Supreme Court is §1253, which authorizes direct appeals only from those three-judge court orders that grant or deny interlocutory or permanent injunctions").

The Supreme Court has also determined that an order of a three-judge court short of "granting or denying" injunctive relief is appealable *only* to the appropriate court of appeals under traditional rules of appealability. In *MTM*, 420 U.S. 799, for example, the Supreme Court held that it was without jurisdiction to review an order of a three-judge court dismissing the action where the dismissal was not on the merits of the constitutional claim but on principles of abstention. The Supreme Court vacated the order of the three-judge court and remanded "so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals." *Id.* at 804. In *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90 (1974), the Court found itself without jurisdiction under Section 1253 to review an order of a three-judge court dismissing a claim for lack of standing. Again, the Court vacated the three-judge court's order and remanded "so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals." *Id.* at 101. In *Carey v. Wynn*, 439 U.S. 8 (1978), the Court held that jurisdiction to review an order of a three-judge court denying a request for a declaratory judgment lies in the court of appeals, not the Supreme Court.[5] *See also In re Slagle*, 504 U.S. 952 (1992) (White;

---

[5] While the Supreme Court's jurisprudence interpreting Section 1253 has been criticized where the grant or denial of declaratory relief has the same practical effect as a grant or denial of an injunction, *see e.g.*, Stern, SUPREME COURT

J., dissenting to explain reason for dismissal of certified question) (mandamus petition to compel individual member of three-judge court to disqualify himself lies in court of appeals, not Supreme Court).

The courts of appeals have exercised jurisdiction to review three-judge court orders not denying or granting injunctive relief. In *Hastert v. Illinois State Bd. of Election Commissioners*, 28 F.3d 1430 (7th Cir. 1993), for example, the Court of Appeals for the Seventh Circuit held that it, as opposed to the Supreme Court, had appellate jurisdiction to review a final grant of attorney's fees by a three-judge court. The Court of Appeals for the Fifth Circuit, in *United States v. State of Louisiana*, 543 F.2d 1125 (5th Cir. 1976), held that an order of a three-judge court denying intervention was properly before it and not the Supreme Court. *See also Hays v. State of Louisiana*, 18 F.3d 1319 (5th Cir. 1994) (where three-judge court issued injunction on the merits before court of appeals could rule on the denial of intervention by three-judge court, court of appeals was without jurisdiction; once case is properly before Supreme Court, that court may consider all other interlocutory orders of the three-judge panel, including denial of intervention).

To the extent that footnote 23 in this Court's decision in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994), can be read to suggest that *any* order of a three-judge court may be appealed to the Supreme Court, such suggestion would be incorrect. In *Jordan*, this Court noted, in explaining why the Supreme Court had entertained an appeal from the three-judge court

---

PRACTICE at §2.8, such criticisms are of no value here, as the grant or denial of a discovery motion does not approximate the effect of a grant or denial of an injunction on the merits.

in *Swarb v. Lennox*, 405 U.S. 191 (1972) (i.e., a case relied upon the district court whose order was under review in *Jordan*), that

> 28 U.S.C. §1253 then, as now, provided for direct appeal to the Supreme Court of any order granted or denied by a three judge district court. 28 U.S.C. §1253 (West 1993). See footnote 21, supra.

Id. at 1269 n.23. In *Swarb*, however, the plaintiff class sought an injunction against the application of *cognovit* provisions existing in Pennsylvania law, and the three-judge court had "enjoined the entry of any confessed judgment against a member of the [plaintiff] class in the absence of a showing of the required waiver." 405 U.S. at 200. Thus, the appeal in *Swarb* was within the Supreme Court's direct appellate jurisdiction under Section 1253 as the three-judge court had granted an injunction (albeit not one sufficient to satisfy the plaintiff class, who then appealed). *Jordan*, which referenced Section 1253 merely in summarizing another case, should not be read as binding precedent on the jurisdictional issue raised by this Court.

B. Application

The present appeal was not taken from an order of the three-judge court granting or denying injunctive relief. Indeed, the merits of the constitutional challenge to Act 1 have not yet been resolved, and the House Republican Caucus is not a defendant to the constitutional challenge.[6] Rather, the order from which the House Republican Caucus took the present appeal is a discovery order. As with an

---

[6] A hearing on the merits of the claim in the underlying case was held on March 11-12, 2002. Post-hearing briefs are due March 15, 2002.

order granting attorneys' fees, *see Hastert*, or an order denying intervention, *see State of Louisiana*, jurisdiction to review an otherwise appealable discovery order that is collateral to the merits of the underlying constitutional challenge lies in the court of appeals, not the Supreme Court. Section 1253, by its plain language and as interpreted by the Supreme Court, will not support appealing a discovery order of a three-judge court to the Supreme Court absent "the mediating wisdom of a court of appeals." *MTM*, 420 U.S. at 803 ("issues short of the merits – such as justiciability, subject-matter jurisdiction, equitable jurisdiction and abstention – are often of more than trivial consequence ... discretionary review in any case would remain available"). Any other result would fly in the face of the strong policy favoring minimization of the Supreme Court's mandatory docket.

CONCLUSION

Because the discovery order appealed from does not grant or deny injunctive relief, jurisdiction to review the order of the three-judge court denying the motion for protective order lies in this Court, not the Supreme Court. Accordingly, the appeal should not be dismissed for lack of jurisdiction on the basis of 28 U.S.C. §1253.

Respectfully submitted,

/S/ Linda J. Shorey
John P. Krill, Jr.
Linda J. Shorey
Julia M. Glencer
Counsel for Appellant,
House Republican Caucus

cc: Counsel on Certificate of Service

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439 (Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

The Republican Caucus of the Pennsylvania House of Representatives, which was granted intervention in this matter, appeals to the Supreme Court of the United States from the order denying the Motion to Quash Subpoena or For Protective Order entered in this action on February 22, 2002. The appeal is taken pursuant to 28 U.S.C. §1253.

March 22, 2002 Respectfully submitted,

/S/ Linda J. Shorey
Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
John P. Krill, Jr.
Pa. ID No. 16287
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500

APPENDIX F

Issued by the UNITED STATES DISTRICT COURT
Middle District of Pennsylvania

Case Number:[1] 1: CV 01-2439

RICHARD VIETH et al

Plaintiff(s),

v.

THE COMMONWEALTH OF PENNSYLVANIA, et al

Defendant(s).

SUBPOENA IN A CIVIL CASE

TO: Custodian of Records, Carnegie Mellon University
5000 Forbes Avenue Pittsburgh, PA 15213

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case

Place of Testimony:
Courtroom:
Date and Time:

☐ YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case

Place of Deposition:
Date and Time:

☐ YOU ARE COMMANDED to produce and permit inspection and copy of the following documents or objects at the place, date, and time specified below (list documents or objects):

(1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; and (2) all communications, including requests for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that caucus, and/or any employee or representative of any member pertaining to that contract.

Place: REED SMITH LLP
435 Sixth Avenue, Pittsburgh PA 15219-1886
Date and Time: February 14, 9:30 AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.
Premises:
Date and Time:

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

Issuing Officer Signature and Title (Indicate if Attorney for Plaintiff or Defendant): /s/
Date: February 7, 2002

Issuing Officer's Name, Address and Phone Number: Robert B. Hoffman

---

[1] If action is pending in district other than district of issuance, state district under case number.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439 (Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

EXPEDITED MOTION TO QUASH SUBPOENA
OR FOR PROTECTIVE ORDER

Defendants Lieutenant Governor Jubelirer and Speaker Ryan ("Presiding Officers") hereby file an expedited motion to quash subpoena or for protective order against the subpoena *duces tecum* issued by the Plaintiffs to the Custodian of Records of Carnegie Mellon University on February 7, 2002. Expeditious resolution of this motion is requested as counsel for the recipient of the subpoena *duces tecum* has indicated in writing that he intends to comply with the same on Thursday, February 20, 2002 unless this Court orders otherwise. A supporting Memorandum of Law and proposed form of order are attached.

February 19, 2002

Respectfully submitted,

/S/ Linda J. Shorey
Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
Jason E. Oyler
Pa. ID No. 84473
John P. Krill, Jr.
Pa. ID No. 16287
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
(717) 231-4501 (fax)
Counsel for Defendants
Jubelirer and Ryan

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439
	:	(Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH SUBPOENA OR FOR PROTECTIVE ORDER

This memorandum of law is filed in support of the motion to quash subpoena or for protective order filed by Defendants Lieutenant Governor Jubelirer and Speaker Ryan ("Presiding Officers") against the subpoena *duces tecum* issued by Plaintiffs to the Custodian of Records of Carnegie Mellon University.

I. BACKGROUND

Discovery in this action, which challenges Act 1 (i.e., legislation putting into place 19 congressional districts in the Commonwealth of Pennsylvania pursuant to the 2000 Census), is currently underway. By order dated January 30, 2002, this Court set an expedited discovery in

advance of the evidentiary hearing scheduled for March 11-12, 2002. All discovery other than that requested by the subpoena *duces tecum* at issue here has been scheduled using e-mail, fax, telephone and face to face communication.

At approximately 5:00 PM on Thursday, February 14, 2002, counsel for Presiding Officers received a telephone message from Walter P. DeForest, General Counsel of the Carnegie Mellon University ("CMU"). When counsel spoke to Mr. DeForest approximately a half-hour later, she learned for the first time that a subpoena *duces tecum* had been issued by counsel for Plaintiffs, Robert Hoffman, Esq., to the Custodian of Records of CMU. Because she was unable to reach Mr. Hoffman by phone or by e-mail that evening, Mr. DeForest agreed to fax her a copy of the subpoena *duces tecum*. The fax, received at 7:31 PM, included a cover letter from Mr. DeForest (appended at Tab 1) and a copy of a subpoena *duces tecum* (attached at Tab 2).

The faxed copy of the subpoena *duces tecum* showed that the subpoena commanded the Custodian of Records of CMU (or a designee) to appear for deposition and requested production of the following documents:

> (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; an[d] (2) all communications, including request for maps or data, between Beverly Clayton

> and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

Tab 2 (boxes checked for "You are commanded to appear" and "You are commanded to produce"). The date and time set for compliance was listed as February 14, 2002 at 9:30 AM. *Id.*

Mr. DeForest had explained, during the initial telephone conversation with counsel for Presiding Officers, that Plaintiffs' counsel, Mr. Hoffman, had agreed to limit the production request to the contract, invoices, checks and correspondence and that a deposition would not be necessary. The purpose of Mr. DeForest's initial contact with counsel for Presiding Officers had been to inquire whether she wanted copies of the documents that he intended to produce. As counsel for Presiding Officers had not received a copy of the subpoena *duces tecum* prior to its fax transmission from Mr. DeForest, and the faxed copy did not include a certificate of service, counsel asked Mr. DeForest to hold production until she could discern why she had not received notice and assess whether a privilege objection by Presiding Officers would be appropriate.

Counsel for Presiding Officers was informed the next day (Friday, February 15, 2002) by Mr. Hoffman that a service copy of the subpoena *duces tecum* had been sent to her by first class mail on February 8, 2002. Mr. Hoffman faxed her a Notice of Service, along with a copy of a subpoena and certificate of service, that had been filed

with the Clerk of the Middle District on February 8, 2002.[7] The copy of the subpoena did not have any boxes checked (copy attached as Tab 3).

That afternoon, Presiding Officers submitted written objections to the subpoena *duces tecum* (copy appended at Tab 4). First, pursuant to Fed.R.Civ.P.32 (d)(1), Presiding Officers objected that they had not, as a party, received notice of the deposition shown on the subpoena copy received from CMU, as required by Fed.R.Civ.P. 30(d)(1) ("[a] party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action").[8] Second, Presiding Officers objected to the document production because the documents sought are protected from disclosure by the federal common law legislative privilege. With the latter objection in writing, and pursuant to Fed.R.Civ.P. 45(c)(2)(B), counsel for Presiding Officers informed both Mr. Hoffman and Mr. DeForest (copy of letter appended at Tab 5) that disclosure of the requested documents should not occur unless pursuant to court order.

On Monday, February 18, 2002, counsel for Presiding Officers received by first class mail a service

---

[7] She later learned from counsel for Executive Officers, J. Bart DeLone, that Mr. DeLone's office had received a service copy of the subpoena *duces tecum* by mail but had not brought it to the attention of counsel for Presiding Officers prior to her present inquiry.

[8] Counsel for Presiding Officers raised an objection based on Fed.R.Civ.P. 30(b)(1) because, based on the copy of the subpoena *duces tecum* received from Mr. DeForest, it appeared that the Custodian of Records (or a designee) had been summoned for deposition. *See* Tab 3.

copy of subpoena *duces tecum* and certificate of service (copy attached at Tab 6); *see also* Affidavits of Cory Angell (Tab 7), Alan Moore (Tab 8) and Wanette Legaspi (Tab 9). Like the copy of the subpoena *duces tecum* faxed by Mr. Hoffman on February 15, 2002 (but unlike the copy faxed by Mr. DeForest), the service copy received by mail had no boxes checked.

Having unsuccessfully attempted to resolve this discovery dispute with Plaintiffs' counsel (*see* certificate of conferral attached to Motion), Presiding Officers now seek a protective order against the subpoena *duces tecum* pursuant to Fed.R.Civ.P. 26(b)(1) and 26(c). Expeditious resolution of this discovery dispute is appropriate as Mr. DeForest has indicated in writing that he intends to comply with the production request by February 20, 2002 unless ordered not to do so by this Court. *See* Tab 1. Additionally, the close of discovery in this matter is imminent.

II. QUESTIONS PRESENTED

1. Should the subpoena *duces tecum* be quashed because Presiding Officers did not receive a notice of deposition?

Suggested answer: YES.

2. Should a protective order be issued because the subpoena *duces tecum* requests documents and information protected against disclosure by the federal common law legislative privilege?

Suggested answer: YES.

III. ARGUMENT

A. Subpoena *Duces Tecum* Should Be Quashed

Presiding Officers do not contend that a copy of the subpoena *duces tecum* was not served on them by first class mail. Rather, they contend that they were not served with the notice of deposition required by Fed.R.Civ.P. 30(b)(1). Notably, the copy of the subpoena served on counsel for Presiding Officers is materially different than the copy received from Mr. DeForest and believed to have been served on the Custodian of Records of CMU. The copy received from Mr. DeForest had boxes checked next to "You are commanded to appear" and "You are commanded to produce." The copy faxed by Mr. Hoffman, and ultimately received by counsel for Presiding Officers by first class mail on February 18, 2002, had no boxes checked. As a party to this action, Presiding Officers are entitled to reasonable notice of deposition. Fed.R.Civ.P. 30(b)(1). In the absence of such, the subpoena *duces tecum* should be quashed.

B. A Protective Order Should Issue

1. Standard

Under Fed.R.Civ.P.26 (b)(1), a party "may obtain discovery regarding any matter, *not privileged*, which is relevant" to the subject matter involved in the pending action. (emphasis added.) "As an initial matter, [] all relevant material is discoverable *unless an applicable evidentiary privilege is asserted* [;] ... any material covered by a properly asserted privilege would necessarily be protected from discovery pursuant to Rule 26(b)(1)."

Pearson v. Miller, 211 F.3d 57, 65 (3d Cir. 2000) (emphasis added). *See also Rhone-Poulenc v. The Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994) (writ of mandamus issued to district court directing it to vacate order requiring the production of documents subject to attorney-client and work product privileges).

Presiding Officers, as explained below in Argument Section 4, have standing to raise this privilege objection to the subpoena *duces tecum* because it infringes upon their rights. *See e.g., Minnesota School Boards Association Ins. Trust v. Employers Ins. Co.*, 183 F.R.D. 627, 629 (N.D. Ill. 1999) (agreeing that "it is well settled that a party has standing to object to a subpoena directed at a nonparty when the party claims a 'personal right or privilege' regarding the documents sought."); *see also Dreyer v. GASC, Inc.*, 204 F.R.D. 120, 121 n.3 (N.D. Ind. 2001) (citing *Minnesota School Boards* and allowing plaintiff to assert privilege under Fed.R.Civ.P. 45(c)(2)(B) against non-party subpoena issued to plaintiff's psychiatrist); 9 MOORE'S FEDERAL PRACTICE § 45.04[2] (3d ed. 2001) (party to action has standing to object to subpoena directed to a nonparty when the party claims a personal right or privilege regarding the documents sought).

2. The common-law legislative privilege

In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the United States Supreme Court recognized a common-law legislative immunity for state legislators that protects them, absolutely, from liability for their legislative activities. This immunity is co-extensive with the protection provided to members of Congress by the Speech or Debate Clause of the United States Constitution. *See Supreme Court of*

Virginia v. Consumers Union of the United States, 446 U.S. 719, 733 (1980). *See also Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (reaffirming *Tenney* and extending common law legislative immunity to local legislators); *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.3d 240, 249 (3d Cir. 1998) ("[T]he Supreme Court has recognized that in civil cases, the scope of the common law legislative immunity accorded state legislators is coterminous with that of the immunity provided by the Speech or Debate Clause"). The legislative privilege "preserve[s] the constitutional structure of separate, coequal, and independent branches of government," *United States v. Helstoski*, 442 U.S. 477, 491 (1979), and "insures that legislators are free to represent the interests of their constituents without fear [ ] they will be later called to task in the courts for that representation." *Powell v. McCormack*, 395 U.S. 486, 503 (1944).

The absolute legislative immunity applicable in civil matters extends beyond protection from liability and provides legislators with protection from "the burden of defending themselves" when "engaged 'in the sphere of legitimate legislative activity.'" *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (quoting *Tenney*, 341 U.S. at 376). The immunity operates as a privilege to protect legislators and others performing legislative activities from questioning in any context, including discovery. *See Gravel v. United States*, 408 U.S. 606, 616 (1972) ("[w]e have no doubt that Senator Gravel may not be made to answer - either in terms of questions or in terms of defending himself from prosecution – for the events that occurred at the subcommittee meeting); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) (quashing deposition subpoena to non-party deponent former Congressman); *MINPECO, S.A. v. Conticommodity*

Services, Inc., 844 F.2d 856 (D.C. Cir. 1988) (affirming the quashing of subpoenas *duces tecum* to custodian of records and staff director of congressional subcommittee seeking information and documents within the subcommittee's possession); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (quashing subpoenas *duces tecum* issued to two Congressman for documents stolen from a law firm and submitted to congressional subcommittee).[9] As explained by the district court in *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 297 (D.Md. 1992), in a challenge to a legislative redistricting plan, "legislative immunity not only protects state legislators from civil liability, it also functions as an evidentiary and testimonial privilege."

"Absolute legislative immunity attaches to actions taken 'in the sphere of legitimate legislative activity.'" *Bogan*, 523 U.S. at 54 (quoting *Tenney*, 341 U.S. at 376). The determination of "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it" because "it [is] simply 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Id.* at 54-55 (quoting *Tenney*, 341 U.S. at 377). Document requests that

---

[9] *See also Chapman v. Space Qualified Systems Corp.*, 647 F. Supp. 551, 554 (N.D. Fla. 1986) (quashing deposition subpoena issued to General Accounting Office investigator who, at the behest of the House of Representatives Committee on Governmental Operations, had been assigned to investigate the plaintiff, because the investigator's conduct and activities were "absolutely immune from discovery under the Speech or Debate Clause"); *United Transportation Union v. Springfield Terminal Railway Co.*, 132 F.R.D. 4 (D.C. Me. 1990) (denying motion to compel documents and deposition testimony from senator's assistant regarding subjects of potential and pending legislation).

seek information related to "actions taken in the sphere of legitimate legislative activity" are, accordingly, prohibited by the privilege.

The determination of whether the activity involved falls within the sphere of legitimate legislative activity is straightforward, as the Third Circuit pointed out in *Government of the Virgin Islands v. Lee*:

> In general [] the cases interpreting the Speech or Debate Clause in which legislative immunity has been triggered have involved manifestly legislative acts; acts which were so clearly legislative in nature that no further examination had to be made to determine their appropriate status. See e.g., United States v. Helstoski, 442 U.S. 477 (1979) (introducing proposed legislation); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (subpoenaing records for committee hearing); Doe v. McMillan, 412 U.S. 306 (1973) (inserting material in the Congressional Record); Gravel v. United States, 408 U.S. 606 (1972) (introducing evidence during committee hearings); United States v. Johnson, 383 U.S. 169 (1966) (delivering a speech on the floor of the House); Tenney v. Brandhove, 341 U.S. 367 (1951) (interrogating witnesses during committee hearing); Kilbourn v. Thompson, 103 U.S. 168 (1881) (voting on resolutions) ... . [T]he acts themselves were obviously legislative in nature. *It is the very legislative character of these acts which*

immunity).

775 F.2d 514, 522 (3d Cir. 1985) (parallel citations omitted, emphasis added).[10]

3. Application

The subpoena *duces tecum* at issue here is necessarily addressed to legislative activities because it seeks documents involving research requested and conducted in preparation for legislative redistricting proposals.[11] Redistricting is a legislative process. *See e.g. Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("legislative reapportionment is a matter for legislative consideration and determination"). The litigation in which the subpoena in question was issued involves the constitutionality of the law enacted by the General Assembly that puts in place the

---

[10] While a criminal case, *Lee's* discussion of how a court identifies a legislative act is applicable whenever a court must decide if legislative activities are involved.

[11] Presiding Officers note that the contract sought is available to any member of the general public upon request to the leader of the House Republican Caucus. Fed.R.Civ.P. 26(b)(2) authorizes a court to limit the extent of discovery if the documents sought are "obtainable from some other source … ." *See also Allen v. Howmedica Leibinger, Inc.*, 190 F.R.D. 518 (W.D. Ten.. 1999) (in the absence of a showing that the publicly available information is inadequate, court finds the production request burdensome); *Duskin Pub. Group, Inc. v. Kinko's Service Corp.*, 136 F.R.D. 334 (D. D.C. 1991) (plaintiff not entitled to compel production of publicly available documents); *Bass v. Gulf Oil Corp.*, 304 F. Supp. 1041, 1049 (S.D. Miss. 1969) ("good cause" not shown in context of motion for production where "most, if not all, [of the documents requested], are readily available to the movants as public records").

19 congressional districts allocated to Pennsylvania after the 2000 census. The process of enacting legislation, including the investigation and evaluation done before a bill is introduced, is legislative activity. *See e.g., Doe*, 412 U.S. at 313 (authorizing an investigation, holding hearings and preparing a report are all "integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation ..."); *Lee*, 775 F.2d at 521 ("factfinding, information gathering and investigative activities" are afforded legislative immunity); *Pentagen Technologies Int'l. Ltd. v. Committee on Appropriations of the United States House of Representatives*, 20 F. Supp.2d 41, 43-45 (D. D.C. 1998) (quoting *Eastland*, 421 U.S. at 504) ("the Supreme Court has concluded that the power to investigate falls within the legislative sphere because 'a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change'"). The documents requested are protected absolutely from disclosure.

4. Presiding Officers Can Assert The Legislative Privilege

The legislative privilege is institutional when raised in the context of a constitutional challenge to legislation. *See United States v. Craig*, 528 F.2d 773, 780-81 & n.2 (7th Cir. 1976) (privilege provides "an institutional immunity for the legislature itself"); *see also In re Grand Jury Investigation*, 587 F.2d 589, 593 (3d Cir. 1978) (privilege is of "great institutional importance to the House as a whole, [and] it is also personal to each member"). Legislators seeking to preserve the privilege on the

institution's behalf must be permitted to assert it against those who would subvert its protections. *Cf. Montgomery County v. Schooley*, 627 A.2d 69, 120-121 (Md. App. 1993) (county could raise privilege against councilman to prevent testimony about redistricting process). Otherwise, a privilege which serves as a bulwark of separation of powers could be consistently lost for reasons conflicting with the interests of the institution. Presiding Officers must be allowed to assert the privilege against production of documents that implicate legitimate legislative activity.[12]

To permit waiver through the release of documents by a non-party who has been involved in the legislative process is inconsistent with the institutional purposes served by the privilege:

> The privilege protects the institution of the Legislature itself from attack [as well as] the individual legislators personally. ... *To allow the privilege to be waived would be inconsistent with these purposes.* The privilege is *institutional* in its protection of the Legislature, ensuring the separation of powers among the coequal branches of government. [Allowing] an individual legislator to waive the institution's privilege *would be to allow one to act on behalf of the whole in waiving the protection of a significant bulwark of our constitutionally mandated system of government.*

---

[12] The House Republican Caucus has filed a motion to intervene for the limited purpose of supporting the present motion.

Holmes v. Farmer, 475 A.2d 976, 985 (R.I. 1984) (redistricting plan); *see also U.S. Football League v. NFL*, 842 F.2d 1335, 1375 (2d Cir. 1988) (purposes of Speech or Debate protection would be "'ill-served' if such waivers were permitted"). Indeed, in *Helstoski*, the Supreme Court strongly intimated that the legislative privilege cannot be waived. *See* 442 U.S. at 492 (Congressman's words and conduct were not explicit and unequivocal waiver ... "*assuming such a waiver can ever be made*") (emphasis added). Where legislation is challenged on constitutional grounds, and "the legislative process itself or [] the end product of that process," is under attack, "waiver by a non-party of the privilege may, in effect, dictate the waiver by other legislators of their privilege," and lead to the dismantling of the separation of powers pillar upon which the privilege is, in part, based. *See Montgomery County v. Schooley*, 627 A.2d at 121 (refusing waiver in challenge to redistricting plan).[13]

---

[13] This is just the first time the Court will need to address issues of the legislative privilege in this matter. At the hearing held in state court in *Erfer v. Commonwealth et al.*, 14 M.M. 2002, Petitioners (represented by the same counsel as Plaintiffs here) called, *inter alia*, Representative DeWeese (Minority Leader of the Pennsylvania House of Representatives) to testify concerning the legislative process of enacting Act 1. Presiding Officers' counsel repeatedly objected to Rep. DeWeese's testimony as prohibited by Speech or Debate immunity under the Pennsylvania Constitution. The objections were taken under advisement. Commonwealth Court's recommended findings and conclusions did not rely on the testimony to which Presiding Officers objected and so made no ruling on the testimony. Final resolution of the issue, however, is unknown since the Pennsylvania Supreme Court has not yet issued an opinion in support of its denial of the *Erfer* Petitioners' state constitutional claims. It is anticipated that Plaintiffs will, at a minimum,

CONCLUSION

For the reasons set forth above, Presiding Officers respectfully request that the subpoena *duces tecum* issued to CMU be quashed or a protective order be issued, on the basis of the common law legislative privilege, to prevent the disclosure of the documents requested.

February 19, 2002

Respectfully submitted,

/S/ Linda J. Shorey
Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
Jason E. Oyler
Pa. ID No. 84473
John P. Krill, Jr.
Pa. ID No. 16287
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
(717) 231-4501 (fax)
Counsel for Defendants Jubelirer and Ryan

---

proffer Rep. DeWeese's testimony for the same purposes in this matter. Permitting even one breach of the legislative privilege that protects legitimate legislative activity will lead to the potential of testimony from each of the legislators, in both chambers, who considered and voted on the legislation, as well as that of those who assisted them in the process. Even the Governor, who signed the legislation, becomes a potential witness.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439
	:	(Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

MOTION TO INTERVENE OF HOUSE REPUBLICAN CAUCUS

The Republican Caucus of the Pennsylvania House of Representatives hereby files this Motion to Intervene for the limited purpose of joining the Motion to Quash Subpoena or For Protective Order filed by Presiding Officers against the subpoena *duces tecum* issued by Plaintiffs to the Custodian of Records of Carnegie Mellon University. A memorandum of law in support of intervention is being filed contemporaneously with this motion. A proposed order is attached.

February 19, 2002

Respectfully submitted,

/S/ Linda J. Shorey
Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
Jason E. Oyler
Pa. ID No. 84473
John P. Krill, Jr.
Pa. ID No. 16287
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
Counsel for House Republican Caucus

CERTIFICATE OF CONCURRENCE/NON-CONCURRENCE

I certify, pursuant to Middle District L.R. 7.1, that on February 18, 2002, I sought the concurrence of Plaintiffs' counsel (Robert Hoffman, Esq.) in the foregoing motion and that concurrence was denied. Counsel for Defendants Executive Officers concurs in the foregoing motion.

/S/ Julia M. Glencer
Julia M. Glencer
Pa. ID No. 80530
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
(717) 231-4501 (fax)
Counsel for Intervenor
House Republican Caucus

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
	:	No. 1:CV-01-2439
	:	(Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE OF HOUSE REPUBLICAN CAUCUS

The House Republican Caucus files this Memorandum of Law in support of its Motion to Intervene.

I. BACKGROUND

This action challenges Act 1, legislation putting into place 19 congressional districts pursuant to the 2000 Census. A hearing in this matter is presently scheduled before a three-judge court on March 12-13, 2002. It has come to the attention of the House Republican Caucus that Plaintiffs, on February 7, 2002, issued a subpoena *duces tecum* to the Custodian of Records for Carnegie Mellon University, seeking production of the following documents:

> (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; an[d] (2) all communications, including request for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

The documents requested are protected against disclosure by the federal common law legislative privilege. The House Republican Caucus, as the entity which engaged in the legislative activity implicated by the documents, has standing to assert the privilege.

II. QUESTION PRESENTED

Should the House Republican Caucus be permitted to intervene for the sole purpose of joining Presiding Officers' Motion to Quash Subpoena or For Protective Order that concerns documents requested by the subpoena *duces tecum*, dated February 7, 2002, issued to Carnegie Mellon University?

Suggested Answer: YES.

III. ARGUMENT

Intervention as of right for the limited purpose of asserting and protecting the legislative privilege is appropriate under Fed.R.Civ.P. 24. *See Gravel v. United States*, 408 U.S. 606 (1972) (United States Senator, as intervenor, asserting the legislative privilege to quash subpoena issued to legislative aide); *In re Grand Jury Proceedings*, 563 F.2d 577 (3d Cir. 1977) (state senator permitted to intervene in government proceeding to assert privilege against production of documents); *see also United States v. American Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980) (privileges, including work product privilege, satisfy the definition of "legal interest" in Fed.R.Civ.P 24; otherwise, entity with claim of privilege could suffer the obvious injustice of having his claim erased without ever being heard); *In re Grand Jury Matter*, 735 F.2d 1330 (11th Cir. 1984) (per curiam) (vacating district court's denial of motion to intervene by clients of attorney subpoenaed to appear before grand jury with client files).

The House Republican Caucus, if permitted to intervene, will join in the Motion to Quash or For Protective Order filed by Presiding Officers and adopt the memorandum of law filed in support thereof.

CONCLUSION

For the reasons set forth above, the House Republican Caucus requests that its motion to intervene for the limited purpose of supporting the Motion to Quash or For a Protective Order filed by Presiding Officers should be granted.

February 19, 2002

Respectfully submitted,

/S/ Linda J. Shorey
Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
Jason E. Oyler
Pa. ID No. 84473
John P. Krill, Jr.
Pa. ID No. 16287
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
(717) 231-4501 (fax)
Counsel for Intervenor
House Republican Caucus

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	:	CIVIL NO. 1:CV-01-2439
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	
Defendants	:	

ORDER

The background of this order is as follows: On approximately February 14, 2002, Plaintiffs filed a subpoena *duces tecum* upon the Custodian of Records of Carnegie Mellon University ("CMU"). Plaintiffs sought from the Custodian certain records pertaining to work that CMU did on behalf of the Republican Caucus of the Pennsylvania House of Representatives ("Republican Caucus"). According to Plaintiffs, CMU performed complex statistical analysis that related to the census data and Act 1. On February 19, 2002, the Republican Caucus filed a motion to intervene for the limited purpose of joining the motion to quash the subpoena *duces tecum*.

Accordingly, **IT IS HEREBY ORDERED THAT** the Republican Caucus's motion to intervene is **GRANTED**.

SYLVIA H. RAMBO
United States District Judge

Dated: February 22, 2002

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439 (Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

MOTION TO STAY ORDER DENYING MOTION TO QUASH AND FOR PROTECTIVE ORDER

Defendants Lieutenant Governor Jubelirer and Speaker Ryan ("Presiding Officers") file the instant motion to stay the order denying the motion to quash and for protective order against the subpoena *duces tecum* issued to the Custodian of Records of Carnegie Mellon University. Presiding Officers and the House Republican Caucus intend to seek an immediate appeal.

February 22, 2002

Respectfully submitted,

/S/ Linda J. Shorey
Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
Jason E. Oyler
Pa. ID No. 84473
John P. Krill, Jr.
Pa. ID No. 16287
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
Counsel for Defendants Jubelirer & Ryan and House Republican Caucus

CERTIFICATE OF CONCURRENCE/NON-CONCURRENCE

I certify, pursuant to Middle District L.R. 7.1, that on February 22, 2002, I sought the concurrence of Plaintiffs' counsel in the foregoing motion but, in light of the shortness of time since the order denying the motion was issued, have yet to hear. Counsel for Defendants Executive Officers concurs in the foregoing motion.

/S/ Julia M. Glencer
Julia M. Glencer
Pa. ID No. 80530
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
(717) 231-4501 (fax)
Counsel for Defendants
Jubelirer and Ryan

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	:	CIVIL NO. 1:CV-01-2439
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	
Defendants	:	

ORDER

IT IS HEREBY ORDERED THAT Defendants' motion to stay order denying motion to quash and for protective order is **DENIED AS MOOT**.

SYLVIA H. RAMBO
United States District Judge

February 26, 2002.